TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 510.

THE UNITED STATES, APPELLANT,

vs.

NELSON W. RIDER.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 9, 1923.

(29060)

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1 Court of Claims.

NELSON W. RIDER,
vs.
THE UNITED STATES. } No. 29–A.

I. *History of proceedings.*

On January 31, 1921, the plaintiff filed his original petition.

On April 2, 1921, a general traverse was filed under rule 34.

On February 15, 1922, the case was argued and submitted by Messrs. Henry W. Driscoll and Harvey D. Jacob, for the plaintiff, and Mr. John G. Ewing, for the defendant.

On February 27, 1922, the court handed down findings of fact and conclusion of law and entered judgment for plaintiff in the sum of $306.82, with an opinion by Hay, J.

On April 28, 1922, the defendant filed a motion for a new trial.

On May 22, 1922, the court filed an order overruling defendant's motion for a new trial, withdrawing former findings and judgment, and filed new findings with judgment for plaintiff in the sum of $367.05. Opinion to stand.

On May 26, 1922, the plaintiff filed a motion for a new trial.

On May 26, 1922, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

2 II. *Amended petition. Filed May 26, 1922, by leave of court.*

Amended petition.

(Filed May 26, 1922.)

To the Honorable Chief Justice and Associate Justices of the Court of Claims:

The plaintiff, Nelson W. Rider, respectfully represents:

I. That he enlisted in the Aviation Section of the Signal Enlisted Reserve Corps in to wit, November 22, 1917, and thereafter, to wit, upon February 9, 1918, commenced active duty under such enlistment as private 1st class, in training for officer of the Signal Officers Reserve Corps, United States Army, a so-called Air Service Cadet, and that he continued on such duty to September 13, 1918, when he was discharged to accept a commission as second lieutenant, United States Army. From February 9, 1918, to April, 1918, plaintiff was in training at the School of Military Aeronautics, Urbana, Illinois, in the aviation ground course; and in May, 1918, he was assigned, by commanding authority, for instruction in the art of flying, to duty requiring regular and frequent participation in aerial flights at the United States Aviation School at Taylor Field, Alabama, with the

designation of Flying Cadet. From May 12, 1918, to Septem-
3 ber 13, 1918, inclusive, he continued and remained in the per-
formance of such flight duty, being required to participate in and actually making, aerial flights one or more times a day in an airplane many days each week, and being subject at all times within said period to performance of such duty.

II. For service during the period from May 12, 1918, to June 30, 1918, inclusive, plaintiff has received pay at one hundred dollars per month, but has not received any additional pay for aviation duty. He now claims 50 per cent increase in pay for said period, the same amounting to eighty-one dollars and sixty-seven cents ($81.67).

III. For service during the period from July 1, 1918, to September 13, 1918, inclusive, plaintiff has received the pay of an enlisted man in the United States Army at the rate of thirty-three dollars per month, plus fifty per centum increase for aviation duty, amounting in all to forty-nine dollars and fifty cents per month. He now claims pay for said period at the rate of one hundred dollars per month, plus fifty per centum increase for flight duty, as the pay of an aviation enlisted man in training to become an officer in the Reserve Corps, United States Army, the same amounting to one hundred and fifty dollars per month, or two hundred, forty-four dollars fifty-five cents ($244.55) more than plaintiff has already received during said period from July 1, 1918, to September 13, 1918, inclusive.

IV. Plaintiff also claims extra pay amounting to six dollars per month as an enlisted man of the Army on active duty whose
4 base pay amounted to forty-five dollars per month or more from February 9, 1918, to May 11, 1918, inclusive, and the said extra pay of six dollars per month, plus fifty per centum increase thereon for flight duty, amounting to nine dollars per month from May 12, 1918, to September 18, 1918, inclusive, in the sum of fifty-five dollars and *and* twenty cents ($55.20).

V. This pay is claimed under the following laws and regulations:

Act of July 18, 1914, 38 Stat. 514, 516.

Act of June 3, 1916, section 13, 39 Stat. 175.

Act of June 15, 1917, section 1, 40 Stat. 182, 188.

Act of May 18, 1917, section 10, 40 Stat. 82.

Act of July 24, 1917, sections 8, 9, 10, 40 Stat. 243, 245, 247.

Act of May 12, 1917, section 1, 40 Stat. 40, 42.

Act of July 9, 1918, section 1, 40 Stat. 845, 849, 850.

Paragraph 1342½, Army Regulations, changes Army Regulations No. 51, War Department, 1917, and changes Army Regulations No. 73, War Department, 1918:

"Enlisted men may be assigned to duty requiring them to participate in regular and frequent aerial flights by the commanding officer

of the aviation station, camp, school, field, post, or aeronautical organization in the field to which such men may be assigned. No enlisted man will be continued on such duty except as authorized by the act of Congress of July 18, 1914.

"Enlisted men assigned to such duty are entitled to the extra pay authorized by the above-cited act of Congress, provided that the extra pay shall not be paid to any such enlisted man for any period during which he has not participated in regular and frequent flights. When failure to participate in flights is due to physical disability resulting from participation in flights, the extra pay for participation in flights shall be continued during the period of such disability.

"The following notation will be made on pay rolls on which the names of such men appear: 'Due soldier fifty per cent increase as aerial flyer. Dates of flight * * *.'

"In the case of a soldier entitled to increased pay for a month during which he did not participate in flights owing to physical disability resultant from participating in flights the appropriate remark will be entered on the pay roll." (Changes A. R. No. 73, W. D. 1918.)

VI. This claim was presented to the Auditor for the War Department and disallowed. No other action has been had on said claim in Congress or by any of the departments; no person other than the plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim or any part thereof or interest therein has been made; the plaintiff is justly entitled to the amounts herein claimed from the United States after allowing all just credits and offsets; the plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The plaintiff is a citizen of the United States. And the plaintiff claims the sum of three hundred and eighty-one dollars and forty-two cents ($381.42).

HENRY W. DRISCOLL,
Attorney for Plaintiff.

District of Columbia, ss.:

Henry W. Driscoll, being duly sworn, deposes and says: I am attorney for the plaintiff in this case. I have read the above petition, and the matters threin stated are true and correct to the best of my knowledge and belief.

HENRY W. DRISCOLL.

Subscribed in my presence and sworn to before me this 26th day of May, 1922.

[SEAL.]

CHARLOTTE B. BULL,
Notary Public.

7 III. *Order of court entered May 29, 1922.*

In this cause the plaintiff's motion to amend findings is allowed. The former findings and judgment are vacated, set aside, and withdrawn, and new findings are this day filed with judgment for plaintiff in the sum of $326.22, together with the opinion heretofore rendered, which stands.

8 IV. *Findings of fact, conclusion of law, and opinion of the court. Entered May 29, 1922.*

This case having been heard by the Court of Claims, the court upon the evidence makes the following

FINDINGS OF FACT.

I.

The plaintiff, Nelson W. Rider, enlisted at Kansas City, Missouri, November 22, 1917, for the aviation section, Signal Enlisted Reserve Corps, as a first-class private. He was called to active duty and directed to proceed to the School of Military Aeronautics in orders dated January 14, 1918, and joined said school February 9, 1918, and was graduated therefrom on April 6, 1918. Plaintiff was in training for a commission from February 9 to September 13, 1918, inclusive. On April 11, 1918, he was transferred to Camp Dick, Texas, and on May 9, 1918, he was transferred to Taylor Field, Alabama, where he reported on May 12, 1918, and was assigned to duty that required him to participate in regular and frequent flights. His flight duties began on May 15, 1918, and his first flight was made on May 29, 1918. Thereafter he made flights on May 31, June 1, 3, and 4, 1918. His next flight was June 24, 1918, and from May 29, 1918, to September 13, 1918, dates inclusive, he made 78 flights. On September 13, 1918, plaintiff was discharged as an enlisted man in order to allow him to accept a commission, and on September 14, 1918, he accepted a commission as second lieutenant in Air Service Aeronautics and was assigned to active duty in that grade on the same date, and on January 14, 1919, he was honorably discharged from the service.

There is a statement in the record that the plaintiff was assigned to duty that required him to participate in regular and frequent aerial flights from June 10, 1918, in orders dated August 20, 1918. This order was not produced, nor was the failure to do so explained. The order transferring plaintiff to Taylor Field, Alabama, was not produced, nor the orders assigning him to the duties performed prior to June 10, 1918.

II.

The plaintiff was paid from February 9, 1918, to March 31, 1918, one month and twenty-two days, at $100 per month, $173.33;

9 from April 1 to 30, 1918, one month, at $100 per month, $100; from May 1 to 31, 1918, one month, $100; from June 1 to 30, 1918, one month, $100; from July 1 to August 31, 1918, two months, $66; aerial flying pay, July 1 to September 13, 1918, two months and thirteen days, $54.45, a total of $593.78.

III.

The plaintiff was paid from May 12, 1918, the date when he reported at Taylor Field for duty in regular and frequent aerial flight service, to September 13, 1918, the date when he was discharged to allow him to accept a commission, the sum of $283.78. If plaintiff is entitled to pay from May 12, 1918, to September 13, 1918, both dates inclusive, four months and two days, at the rate of $100 per month, with 50 per cent increase for said period, for regular and frequent flight service, it would amount to $610, which, less the amount heretofore paid him for the same period, $283.78, would leave the sum of $326.22.

If the plaintiff is entitled to pay from May 12, 1918, to June 30, 1918, both dates inclusive, one month and twenty days, at $100 per month, and 50 per cent increase for flight duty, he should receive $81.67 additional to the sum heretofore paid him for that period.

If entitled to be paid an additional $6 per month from February 9 to September 13, 1918, plus 50 per cent increase thereon for flight duty from May 12 to September 13, 1918, plaintiff would receive $55.20 additional.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of three hundred and twenty-six dollars and twenty-two cents ($326.22).

OPINION.

HAY, Judge, delivered the opinion of the court:

The plaintiff, Nelson W. Rider, was an enlisted man in training for an officer of the Reserve Corps, and was in such training from February 9, 1918, to September 13, 1918, inclusive, upon which latter date he was discharged to accept a commission as second lieutenant, Air Service, United States Army.

The plaintiff was in training in the aviation ground course at the school of Military Aeronautics, Urbana, Ill., from February 9, 1918, to April 6, 1918; at Camp Dick, Texas, from April 11, 1918, to May 9, 1918, on which latter date he was ordered to Taylor Field, Alabama, where he reported on May 12, 1918, and was on duty there from that date until September 13, 1918, and was during this latter period on duty requiring regular and frequent participation in aerial flights.

The act of Congress approved July 18, 1914, 38 Stat. 516, provides that: "Each aviation enlisted man, while on duty that requires him to participate regularly and frequently in aerial flights, or while holding the rating of aviation mechanician, shall receive an increase of 50 per centum in his pay."

By the act of Congress approved June 15, 1917, 40 Stat. 182, 188, the pay of enlisted men in training for officers of the Reserve Corps was fixed at $100 per month.

By the act of Congress approved July 24, 1917, 40 Stat. 243, it was provided: "That all officers and enlisted men of the temporary forces of the Signal Corps, including the aviation section thereof provided for herein, shall be in all respects on the same footing as to pay, allowances, and pensions as permanent officers and enlisted men of corresponding grades and length of service in the Regular Army."

By the act of Congress approved July 24, 1917, 40 Stat. 245, 247, an appropriation of $640,000,000 was made for the Signal Corps, and in the same act it was provided: "That hereafter all * * * enlisted men of the aviation section of the Signal Corps shall be paid by quartermaster disbursing officers from funds transferred to their credit from Signal Corps appropriations.

By the act of Congress approved July 9, 1918, 40 Stat. 850, it was provided: "That funds appropriated by the act approved July 24, 1917, for the fiscal year 1918, entitled 'An act to authorize the President to increase temporarily the Signal Corps of the Army * * * and make appropriations therefor and for other purposes,' and the funds appropriated for the Signal Service of the Army in the act of May 12, 1917, entitled 'An act making appropriations for the support of the Army for the fiscal year 1918' * * * are hereby made available until June 30, 1919."

The above statutes established the right of the enlisted man when on duty that required him to participate regularly and frequently in aerial flights to receive an increase of 50 per cent in his pay. The act of June 15, 1917, 40 Stat. 182, fixes the base pay of an enlisted man in training for officer of the Reserve Corps at $100 per month. The plaintiff was such an enlisted man; he was ordered to duty which required him to participate regularly and frequently in aerial flights. That duty began on May 12, 1918, and continued to September 13, 1918, and for that period he is entitled to receive $100 per month and 50 per cent thereof in addition. In addition to what he has received he is now entitled to receive $326.22.

The plaintiff claims that he is entiled to receive $6 per month in addition to his pay of $100 per month, and 50 per cent of the $6 while engaged in flying. He claims this by virtue of the act of Congress approved May 18, 1917, 40 Stat. 82, which fixes the pay of enlisted men of the Army during the emergency. He claims to come under that class whose base pay is $45 or more per month. But after the passage of the act, the act of June 15, 1917, above referred to, was passed fixing the base pay of enlisted men in training for officers of

the Reserve Corps at $100 per month. The plaintiff is such an enlisted man, and is in a class which was specifically legislated for, and whose pay was fixed by a statute subsequent to the act fixing pay for enlisted men generally, and we are of the opinion that he has no right to the $6 additional which he claims.

The Government contends that the provision of the act of June 15, 1917, which established the pay of the plaintiff at $100 per month expired with the expiration of the appropriations set forth
11 in the act. We are of the opinion that this contention is not tenable because of the provisions of the act of July 24, 1917, and of the act of July 9, 1918, which latter act makes available the appropriations of the act of July 24, 1917, and of the appropriations of the act of May 12, 1917, until June 30, 1919. Nor does it anywhere appear that there was any intention to repeal the provision fixing the pay of enlisted men in training for officers of the Reserve Corps. It is hardly possible to conceive that Congress would at the height of the emergency, while the war was going on, reduce the pay which had been held forth as an inducement to the young men of the country to enter into training for officers in the Reserve Corps.

Judgment will be entered for the plaintiff. It is so ordered.

GRAHAM, Judge; DOWNEY, Judge; BOOTH, Judge; and CAMPBELL, Chief Justice, concur.

12 V. *Judgment of the court.*

At a Court of Claims held in the City of Washington on the Twenty-ninth day of May, A. D., 1922, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the plaintiff, and do order, adjudge, and decree that Nelson W. Rider, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of three hundred and twenty-six dollars and twenty-two cents ($326.22).

By the COURT.

VI. *Defendant's application for and allowance of an appeal.*

From the judgment rendered in the above-entitled cause on the 29th day of May, 1922, in favor of claimant, the defendant, by its Attorney General, on the 15th day of July, 1922, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

Filed July 15, 1922.

Ordered: That the above appeal be allowed as prayed for.

EDW. K. CAMPBELL.

JULY 21, 1922.

13 Court of Claims.

NELSON W. RIDER
vs.
THE UNITED STATES. } No. 29–A.

I, F. C. Kleinschmidt, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Hay, J.; of the judgment of the court; of the defendant's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington city this twenty-fifth day of July, A. D. 1922.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 29060. Court of Claims. Term No. 510. The United States, appellant, vs. Nelson W. Rider. Filed July 29th, 1922. File No. 29060.

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